United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1458

[illegible] be argued by
RONALD E. DEPETRIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1458

B/S

UNITED STATES OF AMERICA,
Appellee,

—against—

ALBERT ANZALONE and ANTHONY VIVELO,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

BERNARD J. FRIED,
RONALD E. DEPETRIS,
Assistant United States Attorneys
(Of Counsel).

UNITED STATES COURT OF APPEALS
FILED
JAN 24 1977
DANIEL FUSARO, CLERK
SECOND CIRCUIT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1458

UNITED STATES OF AMERICA,

Appellee,

—against—

ALBERT ANZALONE and ANTHONY VIVELO,

Appellants.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellants Albert Anzalone and Anthony Vivelo appeal from judgments of conviction of the United States District Court for the Eastern District of New York (Edward R. Neaher, J.) entered on September 24, 1976, after a jury trial, which judgments convicted both appellants of making false declarations before a grand jury in violation of 18 U.S.C. § 1623, both appellants of a civil rights substantive offense in violation of 42 U.S.C. § 3631, and appellant Vivelo of a civil rights conspiracy in violation of 18 U.S.C. § 241.

The indictment in this case named four persons as defendants—appellant Anzalone, appellant Vivelo, Nicolas Lombardi, and Robert Barbieri. It consisted of two civil rights counts, and eight false declaration counts (two against each defendant).

Count One of the indictment charged in essence that the four defendants, together with a co-conspirator Gerald Maddalone,* conspired to impede and prevent Alberto Charles, a black citizen of the United States, from renting and purchasing a house because of his race and color. Count Two charged a substantive civil rights offense—that the four defendants, by shooting and breaking windows of the house, did intimidate and attempt to intimidate Alberto Charles because of his race and color and because he was renting and contracting and negotiating for the rental and purchase of the house.

Counts Three through Six of the indictment charged each of the four defendants respectively with having made false declarations before the grand jury in denying any knowledge of or involvement in the shooting of the windows. Counts Seven through Ten of the indictment charged each defendant respectively with having made other false declarations in testimony before the grand jury concerning other events involved in the civil rights conspiracy.

The trial proceeded against all four defendants. The jury found appellant Anzalone guilty of the civil rights substantive offense (Count Two) and guilty of making a false declaration before the grand jury in denying knowledge of and involvement in the shooting of the windows (Count Four). The jury was unable to reach a unanimous verdict as to appellant Anzalone on the civil rights conspiracy count (Count One), and acquitted him on the other false declaration charge (Count Nine). The jury found appellant Vivelo guilty on both the civil rights conspiracy and civil rights substantive counts (Counts

---

* Maddalone was not named as a defendant in the indictment. He testified as a witness for the government.

One and Two respectively), and guilty of making false declarations before the grand jury in denying knowledge of and involvement in the shooting of the windows (Count Five). It acquitted appellant Vivelo on the other false declaration charge against him (Count Ten).

On September 24, 1976 the district court imposed sentence in this case.* Appellant Anzalone was sentenced to one year imprisonment on the civil rights substantive count and one year imprisonment on the false declaration count on which he was convicted, the terms to run concurrently. Appellant Vivelo was sentenced to eighteen months' imprisonment on the conspiracy count, one year imprisonment on the civil rights substantive count, and one year imprisonment on the false declaration count on which he was convicted, the terms to run concurrently. Execution of sentence was stayed and appellants are free on bail pending this appeal.

On this appeal appellant Anzalone claims that the indictment should be dismissed on the ground that it is tainted by use of his immunized state grand jury testimony. Both appellants claim that the indictment should

---

*The jury found the defendant Lombardi guilty on both civil rights counts and on both false declaration counts against him. The jury found the defendant Barbieri guilty on both false declaration charges against him; it acquitted him on the civil rights conspiracy charge and was unable to reach a unanimous verdict as to him on the civil rights substantive offense.

Lombardi was sentenced to one year imprisonment on each of the four counts—to serve two months concurrently on each count with the balance suspended and defendant placed on probation for ten months. Barbieri was sentenced to one year imprisonment concurrent on each of the two counts—to serve one month with the balance suspended and defendant placed on probation for eleven months.

Although both these defendants filed notices of appeal, each has subsequently withdrawn his appeal.

be dismissed on the ground that it is tainted by use of their immunized federal grand jury testimony. Both appellants further claim that the destruction by an agent of the Federal Bureau of Investigation of his rough notes concerning an interview of the government's chief witness, albeit after preparation of the typewritten statement concerning that interview, constituted reversible error.

Appellants do not attack the sufficiency of the evidence in establishing their guilt beyond a reasonable doubt.

Statement of Facts

(1)

The events depicted at the trial took place in April 1972, and involved efforts by the defendants to prevent a black family from moving into a house located at 351 Milton Avenue in a residential neighborhood on Staten Island.

Appellants Albert Anzalone and Anthony Vivelo, the co-defendants Nicolas Lombardi and Robert Barbieri, and the co-conspirator Gerald Maddalone all lived on Milton Avenue near the house involved herein. Anzalone was a businessman who worked on Wall Street. Vivelo was a police officer employed by the New York City Police Department. He and Anzalone were close friends. Lombardi was employed by the New York City Department of Correction as a corrections officer. Barbieri was a police officer employed by the New York City Housing Authority. Maddalone was a police officer employed by the New York City Police Department. (App. A. 267-275).*

---

* References to the trial transcript are preceded by "R." References to appellants' appendix are preceded by "App. A." References to the government's appendix are preceded by "Gov. A."

The house located at 351 Milton Avenue had been vacant since November 1971. At that time Carl Schlichtinger, a real estate broker who operated a business on Staten Island under the name of Willowcreek Realty Co., became the owner of the house. He had been a friend of the former owner, Roy Gebhardt, since high school. So when Gebhardt and his wife decided to purchase a larger house elsewhere on Staten Island, Schlichtinger did Gebhardt a favor. He agreed to purchase the house at 351 Milton Avenue from Gebhardt for resale—so that Gebhardt could use the equity in the house as a down payment to purchase the larger house. The contract was signed in July 1971, and the closing took place in November 1971. (App. A. 89-90, 95-104)

Both before and after the closing, through Willowcreek Realty Co., Schlichtinger made efforts to sell the house or to rent it with an option to buy. He placed various advertisements in this regard in a local newspaper, the Staten Island Advance. (App. A. 104-107.)

In early March 1972 Mr. and Mrs. Alberto Charles saw one of these advertisements.* Mr. and Mrs. Charles, an educated, hard-working, middle-class black family with three children, had been looking for a house on Staten Island for some time. They looked at this house, liked it, and signed an agreement to purchase the house. (App. A. 118-120, 124, 205-211, 216-218, 252-257.)

Thereafter, they made efforts to obtain a mortgage, but were unable to obtain one large enough such that,

---

* Alberto Charles was born in Venezuela and grew up in Trinidad. His wife, Dorrell Charles, was born and grew up in Trinidad. They came to the United States in 1957. Alberto Charles became a naturalized citizen of the United States in March 1971. (App. A. 205-207, 211, 252.)

together with the down payment money which they had, they were able to meet the sales price. Therefore on April 6, 1972 they signed an agreement with Schlichtinger to rent the house with an option to buy it—a right of first refusal. In the meantime they would continue to try to obtain a sufficient mortgage so that they could buy the house. (App. A. 125-128, 146-151, 220-222, 257-258.)

By this time the word had spread around the neighborhood that a black family was moving into the house at 351 Milton Avenue.* There then occurred a series of acts designed to impede and prevent the Charles family from moving into the house—acts which formed the basis of the charges involved in the trial.

(2)

On Thursday April 6, 1972, after signing the rental agreement with Schlichtinger, Mr. and Mrs. Charles received a set of keys and again visited the house at 351 Milton Avenue. It was in good condition. However, on the next day, when Mrs. Charles returned to the house with two friends from college, they observed that the front windows of the house had been shot out and that there was paint splashed on the front door of the house. (App. A. 152, 223, 258-260.)

---

* Appellants note in their briefs that in June 1972 the Department of State conducted an investigation of Schlichtinger for blockbusting. Appellants fail to set forth the rest of the facts concerning this matter. The investigation was commenced solely on the basis of a complaint by a person living on Milton Avenue. The investigation was later closed, there being no evidence to substantiate the complaint. (R. 222-223.)

There are other such matters set forth in appellants' statement of facts which are similarly misleading. However, in light of the issues raised on appeal, it would serve no useful purpose to go into and clarify these other matters herein.

On the night before appellant Anzalone, appellant Vivelo, Lombardi, and Barbieri had gathered together on the sidewalk in front of the house at 351 Milton Avenue. Anzalone, Vivelo, and Lombardi had BB guns in their hands.* They then proceeded to shoot at and break the front windows of the house.** After a few minutes the four men started walking away toward Vivelo's house across the street. (App. A. 355-358.)

At this time Maddalone arrived home from work, having finished a 4 p.m. to 12 midnight tour of duty. He observed the men standing in front of Vivelo's driveway and joined them. One of the men pointed out what they had done to the windows of the house at 351 Milton Avenue. (App. A. 281-290.)

These men—appellant Anzalone, appellant Vivelo, Lombardi, Barbieri, and Maddalone—then went into the kitchen of Vivelo's house, where they discussed various ways to prevent the black family from moving into the house.*** Appellant Vivelo suggested that he could get a couple of men to fake a traffic accident with Roy Gebhardt, thereby providing a basis to start a fight with him and beat him up.**** Vivelo also suggested that he could get somebody to shoot holes in the roof of the house.

---

* The testimony was conflicting as to whether or not Barbieri also held a BB gun at that time (App. A. 289, 355-356).

** This act formed the basis for overt act "1" of the conspiracy count, and for the civil rights substantive count (Count Two). The denials before the grand jury by each of these four defendants of any knowledge of or involvement in this act constituted the basis for Counts Three through Six of the indictment.

*** This discussion constituted the basis for overt act "2" of the conspiracy count.

**** As noted earlier, Gebhardt was the former owner of the house. Apparently these men were under the mistaken belief that Gebhardt had something to do with the black family moving in.

Then either Vivelo or Anzalone said that the only way to stop the black family from moving into the house was to burn it down.* (App. A. 290-293.)

At the end of this discussion these five men reached an understanding—something had to be done to prevent the black family from moving into the house. However, they did not then decide which of the various suggestions should be followed. (App. A. 293.)

The men then returned to their respective homes. Maddalone, who had arrived home too late to participate in the shooting of the windows, wanted to do something to join in with the efforts of the others. So he got a small jar of paint, went over to the vacant house, and splashed paint on the front door.** (App. A. 293-295.)

(3)

During the remainder of April, 1972 these persons were involved in additional efforts to prevent the black family from moving into the house at 351 Milton Avenue. On or about the early evening of April 10, 1972, the four defendants and Maddalone, together with a number of other persons who lived in the neighborhood, participated in an effort to raise money for a down payment so that a white family could purchase the house, thereby prevent-

---

* Appellant Vivelo states in his brief (p. 7) that Maddalone testified that he could not be positive that either Vivelo or Anzalone said this. This statement is not completely accurate. Maddalone testified that he was positive that one of Vivelo or Anzalone said this; what he wasn't positive about was which of the two said it. (R. 601-602.)

** This formed the basis for overt act "3" of the conspiracy count.

ing the black family from moving in.* Pledges were sought from people living in the area to contribute a sum of money toward raising a down payment. Lombardi kept a list of the neighbors who agreed to contribute money.** (App. A. 307-311; R. 712-718, 796-814, 884-888.)

On or about the night of April 12 or the early morning of April 13, 1972 another act of vandalism occurred. The house was flooded with water, causing extensive water damage.*** (App. A. 160-161.) On that night Barbieri had come over to Maddalone's house, and told him that the house was going to be damaged that night. As Barbieri opened the door to leave, they saw two figures running down Milton Avenue away from the house. Barbieri quickly closed the door, and said, "It's done already". After Barbieri left, Maddalone waited a little while and then went outside. He heard the sound of running water coming from the house at 351 Milton Avenue. The next morning Maddalone had a conversation with Lombardi. Anzalone was present. Lombardi said something to the effect that they (Lombardi and Anzalone) had done the water damage. (App. A. 312-315; R. 493-495.)

Thereafter, on Friday, April 21, 1972, Mr. and Mrs. Charles were about ready to move into the house. They went to the house and moved in a few household items. They arranged for their furniture to be moved in the

---

* This constituted the basis for overt act "4" of the conspiracy count. Further, Lombardi and Barbieri's denials before the grand jury of knowledge of or involvement in this effort to raise money formed the basis for Counts Seven and Eight of the indictment.

** Several days later the arson took place at the house. Thereafter Lombardi destroyed this list of names. (App. A. 311-312.)

*** This act formed the basis for overt act "5" of the conspiracy count.

next day, Saturday, and returned to the Bronx that night where they were staying with friends.* (App. A. 229-231, 261-263.)

That Friday night appellant Anzalone returned home from dinner at about 9 p.m. He saw some neighbors out on the street and remained with them until about 11 p.m. One of the neighbors told him that the black family had been seen carrying cartons into the house that day. (R. 1110.) Appellant Vivelo also had learned earlier that day that the black family had moved in some boxes. (R. 1570). Obviously they were about to move into the house. Later that night at about 12:30 a.m., after completing a 4 p.m. to 12 midnight tour of duty, Vivelo arrived home and went over to Anzalone's house. Vivelo left there and went home at approximately 12:45 a.m.** (R. 1047-1048, 1111.)

Thereafter at approximately 1:15 to 1:20 a.m. Vivelo walked across the street to Anzalone's house.*** (R. 996-1004). Shortly thereafter the final act designed to impede and prevent the black family from moving into the house took place—the house was set on fire, causing ex-

---

* Also on that day Schlichtinger received a phone call from the bank concerning the Charles' mortgage application. The bank stated that the mortgage was verbally approved (App. A. 162.)

** Vivelo's reaction to the imminent move of the black family into the house is surely made clear from prior conversations of his. In late 1971 or early 1972 Vivelo had a conversation with Barbieri concerning the latter's work in the Model Cities Program in teaching blacks. Vivelo's comment was: "How could you teach those niggers." (R. 1919-1921.) Further, in April 1972 Vivelo had a conversation with Barbieri after they learned about the black family attempting to move into the house. Vivelo indicated that he was unhappy and angry about the black family moving in, and that he didn't care for black people. (R. 1916-1917.)

*** It was now only about two weeks after the occasion when, as noted earlier, either Vivelo or Anzalone said that the only way to stop the black family from moving into the house was to burn it down.

tensive damage.* An inflamable liquid was used to set the fire. (R. 1116-1126, 1036-1041.)

At approximately 2:14 a.m. appellant Anzalone made an anonymous phone call to the fire department to report the fire on Milton Avenue. A series of conversations then took place between the fire department dispatcher and Anzalone and his wife, which conversations were recorded. The Anzalones failed to identify themselves and refused to give their own telephone number to the dispatcher; when questioned by the dispatcher as to the address of the fire, they also failed to tell the dispatcher that it was at 351 Milton Avenue. Anzalone later tried to explain his rather extraordinary actions in this regard by telling the fire marshal that the reason for these actions was that he did not want to get involved (despite the fact that he was aware that the house attached to 351 Milton Avenue was occupied). (R. 974-977, 1107-1109, 1113-1114).

POINT I

The federal prosecution of appellant Anzalone was not tainted by any use of his immunized state grand jury testimony.

Under a grant of transactional immunity appellant Anzalone testified before a state grand jury investigating the fire at 351 Milton Avenue. Appellant contends that the indictment herein should be dismissed because of taint arising from the government's use of that testi-

---

* These two acts—Vivelo walking over to Anzalone's house and the arson shortly thereafter—formed the basis for overt acts "6" and "7" respectively of the conspiracy count. Anzalone and Vivelo's denials before the grand jury of the first of these two acts, which had been witnessed by a neighbor's son when he returned from a date in New Jersey, formed the basis for Counts Nine and Ten of the indictment.

mony in this prosecution. However, as will be shown below and as the district court found after a post-trial evidentiary hearing on this issue (Gov. A. 105), the federal investigation and prosecution were not in any way tainted by appellant's immunized state grand jury testimony.*

1. The Underlying Facts

(1)

The state grand jury investigation commenced on May 2, 1972. Appellant Anzalone testified before the Richmond County grand jury on April 18, 1973 under a grant of transactional immunity from state prosecution. He was the next to last witness who testified before that grand jury.** (App. A. 443).

A post-trial evidentiary hearing was held to determine whether Anzalone's immunized state grand jury testimony had tainted the federal prosecution.*** The transcript of that testimony was introduced in evidence at the hearing. A reading of the testimony indicates

---

* A number of exhibits were introduced in evidence at the evidentiary hearing. We have included the critical exhibits in the government's appendix. We will have the remaining exhibits available at oral argument should the Court desire to examine them.

** No indictments resulted from the grand jury investigation.

*** Appellant Anzalone had raised this matter in a pre-trial motion. However, on the basis of the government's affidavit submitted in opposition to the motion indicating no substantial likelihood of any tainted evidence (App. A. 435, 442-450), the district court properly decided that the matter of taint would best be resolved at a post-trial evidentiary hearing. See *United States* v. *DeDiego*, 511 F.2d 818, 823-824 (D.C. Cir. 1975); *United States* v. *First Western State Bank of Minot, N.D.*, 491 F.2d 780, 787 (8th Cir.), *cert. denied*, 419 U.S. 825 (1974).

that Anzalone did not admit to having participated in any of the acts involved herein; his testimony was exculpatory, and essentially useless (Gov. A. 107-152).

Appellant Anzalone had been interviewed shortly after the fire in April 1972 by fire marshal Romero and by police detective Corbett, which interviews occurred well before Anzalone's state grand jury testimony. Reports of these interviews were prepared by Romero (Gov. A. 180-181) and Corbett (Gov. A. 165-166). Romero and Corbett also testified before the state grand jury concerning these interviews, which testimony also long predated Anzalone's state grand jury testimony (Gov. A. 168-179 and 153-162 respectively). A reading of these materials indicates that the testimony of Anzalone in the state grand jury is essentially the same as his statements to Romero and Corbett. Consequently the information in Anzalone's state grand jury testimony was available to federal investigators and attorneys from these other legitimate sources.

(2)

In June 1973 transcripts of the state grand jury testimony, including that of appellant Anzalone, were turned over to the United States Attorney's Office by the District Attorney's Office of Richmond County. Thereafter, in the summer 1973, an Assistant United States Attorney did review these transcripts, including that of appellant Anzalone, and prepared a memorandum to the file analyzing the facts and the law involved in the case, in which brief reference was made to portions of Anzalone's state grand jury testimony. This attorney did not commence any grand jury investigation in this case, and played no role in connection with the presentation of this case to the grand jury. Indeed, the attorney left the office in the spring 1974, several months prior to the commencement of the instant grand jury investigation. (App. A. 443.)

In the meantime the United States Attorney requested the Civil Rights Division of the Department of Justice to review the matter (App. A. 443; Gov. A. 68). John Scott, an attorney with the Civil Rights Division, was assigned to review the matter. After his review of the case, including the transcripts from the state grand jury, the Civil Rights Division requested the Federal Bureau of Investigation ("FBI") to conduct an investigation. In Scott's opinion there was nothing useful in Anzalone's state grand jury testimony; that testimony played no role in the request to the FBI, and provided no leads in the investigation. (App. A. 465-468.)

Vincent Savadel, the FBI case agent in this matter, then conducted a thorough investigation. In this regard agent Savadel did review the transcripts of the state grand jury testimony, including that of appellant Anzalone. However, the state grand jury testimony of Anzalone was not of any value to his investigation, and did not provide any leads for the investigation. It was not used with respect to any decision he made as to any course of action in the investigation; it had no influence on his investigation. The key break in the investigation came in March 1974, when Gerald Maddalone made statements concerning his knowledge of criminal activities in this case to agent Savadel. That interview was not in any way a result of Savadel's having read Anzalone's state grand jury testimony. (App. A. 487-493.)

After the completion of the FBI investigation in the spring 1974, the case was reviewed by another Assistant United States Attorney, who did not read the state grand jury testimony. In this connection a law school student in the United States Attorney's Office clinical program did review the transcripts of the state grand jury testimony, including that of appellant Anzalone. The student

wrote a memorandum to the Assistant United States Attorney, in which brief references were made to portions of Anzalone's testimony. Thereafter, the Assistant United States Attorney recommended to the United State Attorney that a grand jury investigation be conducted. (App. A. 444; Gov. A. 67.)

On August 19, 1974, the United States Attorney assigned this case to Assistant United States Attorney Ronald E. DePetris, yet another Assistant United States Attorney. He conducted an exhaustive review of the matter and recommended that a grand jury investigation be conducted. The requisite authorization was obtained from the Civil Rights Division. (App. A. 444.)

In the course of recommending that the Civil Rights Division authorize the grand jury investigation, Scott prepared a prosecutive summary, which contained a brief reference to Anzalone's state grand jury testimony. However, that testimony did not play any role in the decision to authorize the grand jury investigation, and was of no use in considering any course of action during the course of the investigation and prosecution. (App. A. 468-471.)

After obtaining the requisite authorization from the Civil Rights Division, Assistant United States Attorney DePetris commenced the grand jury investigation with the presentation of the first witness on November 12, 1974. The lengthy grand jury investigation culminated in an indictment handed up on October 14, 1975. (App. A. 444-445.)

After being assigned the case in August 1974, DePetris did make a brief review of the two previously mentioned memoranda, which contained brief references to Anzalone's state grand jury testimony. However,

he did not rely on these memoranda prepared by others, but rather made an exhaustive review of the reports of the FBI investigation, the transcripts of the state grand jury testimony (other than Anzalone's), and the reports made by the Bureau of Fire Investigation and the New York City Police Department. He made extensive notes during the course of reviewing these materials. DePetris specifically did not read the immunized state grand jury testimony of Anzalone, in order to avoid any problem of taint. The brief references to Anzalone's testimony in the above-mentioned memoranda were not the sources of any leads and were not used in making any decisions or other action; rather the steps DePetris took in this investigation were based on the extensive notes referred to above, and leads developed therefrom.* (App. A. 445; Gov. A. 63-70.)

In September, 1974, Seth Kaufman, a law student in the United States Attorney's Office clinical program (not the student who wrote the memorandum referred to earlier), was assigned to work with DePetris. In this regard, Kaufman assisted DePetris in connection with the instant case. Among other matters Kaufman reviewed the relevant materials, did legal research, and drafted questions for use by DePetris in the presentation of witnesses to the grand jury. (App. A. 445; Gov. A. 4-5.)

---

* A few months elapsed between the time DePetris initially read these memoranda and the time the grand jury investigation commenced. At that time DePetris had no recollection as to what was in the two memoranda concerning Anzalone's state grand jury testimony other than the fact that he was aware that Anzalone had apparently denied any involvement. However, DePetris was aware of that from the interview of Anzalone by the marshal and police detective. (Gov. A. 64.) DePetris' extensive notes contained no references concerning Anzalone's state grand jury testimony other than a reminder not to read the testimony. (Gov. A. 65.)

In September, 1974, Kaufman reviewed the voluminous materials involved in this case, including FBI reports, fire marshal reports, police department reports, and state grand jury transcripts. At that time he did read Anzalone's state grand jury testimony, but was of the opinion that it was essentially worthless to the investigation. (Gov. A. 5-6, 14.)

Other than some legal research, it was not until December, 1974, when Kaufman did further work on this case (Gov. A. 6-7). At that time DePetris and Kaufman had a conversation, in which DePetris learned that Kaufman had read Anzalone's state grand jury testimony. This disclosure caused DePetris to explain to Kaufman the effect of immunized state grand jury testimony, and that Anzalone's testimony was not to be used for any purpose in the investigation. DePetris did not discuss the contents of Anzalone's testimony with Kaufman. (Gov. A. 9-11, 15.)

Thereafter, Kaufman did perform other assignments in connection with this case, including drafting questions for use by DePetris in examining grand jury witnesses. Kaufman mainly used the FBI reports and fire marshal reports in this regard. He did not make any use of Anzalone's state grand jury testimony in drafting these questions or in any other assignment in connection with this case. (Gov. A. 11-16, 20-22.)

DePetris and Savadel played the major roles in the investigation and prosecution of this case. DePetris did not read Anzalone's state grand jury testimony,* and did not discuss its contents with Savadel (App. A. 492).

---

* After the trial and in preparation for the taint hearing, DePetris did read Anzalone's state grand jury testimony.

Moreover, the interviews of Anzalone by the fire marshal and police detective as reflected in their reports and state grand jury testimony were legitimately available to and read by both DePetris and Savadel * (Gov. A. 64; App. A. 490-491).

Scott and Kaufman played a lesser role in the investigation. DePetris did not discuss the contents of Anzalone's state grand jury testimony with them (App. A. 483; Gov. A. 15). Moreover, the interviews of Anzalone by the fire marshal and police detective were also legitimately available to and read by them (App. A. 471-475; Gov. A. 6).

Although they played no role in the grand jury investigation herein, another Assistant United States Attorney and another law student had earlier read the state grand jury testimony. DePetris did not discuss the case with them (App. A. 443, 444). Moreover, their memoranda (Exs. 23 and 24 at the evidentiary hearing) indicate that the interviews of Anzalone by the fire marshal and police detective were also legitimately available to and read by them.

(3)

Assistant United States Attorney DePetris was the attorney who presented this case to the grand jury and who conducted the trial on behalf of the government. At the evidentiary hearing, DePetris established the sources of the evidence and witnesses implicating Anzalone in this prosecution.** The evidence and witnesses did not

---

* As noted earlier, these interviews provide essentially the same information as does Anzalone's state grand jury testimony.

** The government and counsel for appellant reached a stipulation that as to the five witnesses at the trial who did not implicate Anzalone (background witnesses and witnesses who implicate codefendants), their testimony was not derived from Anzalone's state grand jury testimony. (Gov. A. 52-61.)

stem from Anzalone's state grand jury testimony, but were derived from legitimate sources wholly independent of that testimony. These independent sources included FBI reports of interviews of witnesses, and transcripts of the state grand jury testimony of witnesses who testified prior to the date of Anzalone's immunized state grand jury testimony. (Gov. A. 40-52, 61.)

(4)

At the conclusion of the evidentiary hearing the district court reserved decision in order to review the testimony and the exhibits. Thereafter the district court found that the federal investigation was not the fruit of Anzalone's state grand jury testimony and, accordingly, denied appellant's motion in this regard (Gov. A. 105).

2. The Applicable Law

The constitutional privilege against self-incrimination protects a witness testifying under a grant of immunity in a state proceeding against self-incrimination under federal as well as state law. The federal government is prohibited from using the testimony itself, as well as evidence derived directly or indirectly therefrom. *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 77-79 (1964). See also *Kastigar* v. *United States*, 406 U.S. 441, 453-462 (1972). The burden is on the government to establish that its evidence is derived from a source wholly independent of the immunized testimony. See *Kastigar* v. *United States*, *supra*, 406 U.S. at 460; *Murphy* v. *Waterfront Comm'n*, *supra*, 378 U.S. at 79, n. 18.

The government fully met its burden at the evidentiary hearing below. The Assistant United States Attorney who conducted the federal grand jury investigation

and prosecution did not read appellant Anzalone's immunized state grand jury testimony. The other federal personnel who read the testimony did not use the testimony in furtherance of the investigation, either as a lead to evidence or in making any decision in connection with the case. Further, Anzalone's testimony was circumspect, exculpatory, and essentially useless to any investigation. Moreover, essentially all the relevant information contained in appellant's state grand jury testimony was available to the federal government from other legitimate sources * (namely, the interviews of Anzalone by the fire marshal and police detective as reflected in their reports and state grand jury testimony, which predated Anzalone's state grand jury testimony). Finally, there was a wholly independent source for the evidence against Anzalone in the federal prosecution. Under all these circumstances appellant's taint motion was properly denied. *United States* v. *Catalano*, 491 F.2d 268, 272 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974).

Indeed, on this appeal appellant Anzalone has not directed the Court's attention to any misuse of the immunized state grand jury testimony or to any tainted evidence, let alone shown that the factual finding of the district court was clearly erroneous. Rather appellant's position appears to be that the government's access to the immunized state grand jury testimony *ipso facto* prevents the government from carrying its burden under *Kastigar* v. *United States*, *supra*. However, this Court has previously rejected such a peremptory rule. *United States* v. *Catalano*, *supra*, 491 F.2d at 272.

---

* See *United States* v. *Bianco*, 534 F.2d 501, 511, n. 14 (2d Cir. 1976).

POINT II

Appellants' immunized federal grand jury testimony was not improperly used against them in the federal prosecution for civil rights and false declaration offenses.

(1)

On April 29, 1975, appellants Anzalone and Vivelo, after claiming their Fifth Amendment privilege and after an order requiring them to give testimony was issued and communicated to them pursuant to 18 U.S.C. §§ 6002-6003, testified before the federal grand jury investigating the events involved herein * (Gov. A. 199-256, 257-303). The effect was to grant appellants use and derivative use immunity in connection with that testimony as set forth in 18 U.S.C. § 6002.

Before the order was formally communicated to appellants in the grand jury room,** the grand jury had been presented with the question whether or not to hear their immunized testimony. The effect of use immunity was explained to the grand jury by the Assistant United States Attorney, and contrasted with transactional immunity.*** The grand jury was instructed that it could not use such testimony against the witness in connection with, or in voting on an indictment alleging, civil rights offenses; it may consider such testimony against the witness only in connection with perjury or false statement charges in the event that the witness gave false testi-

---

* The grand jury also heard immunized testimony from the other two defendants below—Lombardi and Barbieri.

** Appellants had previously discussed the matter of use immunity with their attorneys. (Gov. A. 201, 259-260.)

*** The stenographer mistakenly recorded in the transcript "contractual" instead of "transactional". (Gov. A. 195.)

mony.* The grand jury was further instructed that it may consider such immunized testimony in connection with civil rights offenses against potential defendants other than the witness.** The grand jury voted unanimously to hear their immunized testimony. (Gov. A. 194-198.)

Appellants' testimony was exculpatory and consisted of denials as to participation in the events involved in the civil rights offenses (Gov. A. 199-256, 257-303).

Thereafter the grand jury indicted appellants on civil rights and false declaration offenses. On January 8, 1976 the district court scheduled the trial for May 3, 1976, and set April 5, 1976 as the return date for all pre-trial motions. Appellants did make various pre-trial motions, but none addressed to the matter of the immunized federal grand jury testimony.***

On May 3, 1976, when the case was called for trial, appellants for the first time brought up the matter of the immunized federal grand jury testimony.**** It was

---

* The stenographer mistakenly recorded "full" statement in stead of "false" statement in certain portions of the transcript (Gov. A. 195, 196).

** Quite obviously, this provides the reason for hearing such testimony. If any of Anzalone, Vivelo, Lombardi, or Barbieri had testified truthfully in the grand jury implicating the others in the civil rights offenses, that person could have been an important witness against the others and strengthened the government's case in this prosecution.

*** As previously noted, appellant Anzalone did raise in his pre-trial motions the matter of his immunized *state* grand jury testimony. That issue was resolved in the post-trial evidentiary hearing. Appellants did not raise the issue of the immunized federal grand jury testimony in the post-trial evidentiary hearing.

**** This was more than six months after the filing of the indictment and about a month after the scheduled return date for all pre-trial motions. Thus the statement in appellants' briefs (p. 9) that it was "immediately" called to the district court's attention is rather curious.

brought up in the context of, and as a basis for, a motion to sever the civil rights and false declaration counts for separate trials.* The district court did not grant the severance motion. (App. A. 21-88).

Appellants did not move to suppress any evidence as being tainted by or derived from the immunized federal grand jury testimony. Nor did appellants ever move to dismiss the indictment on the ground that it was based on the immunized federal grand jury testimony.

The trial proceeded on both the civil rights and false declaration counts. During the course of the trial appellants' grand jury testimony as set forth in the particular false declaration counts (App. A. 5-7, 14-20) was read into evidence.** The district court and counsel then discussed a limiting instruction which would be given to the jury. The jury was then instructed to use the grand jury testimony as read from any particular false declaration count only with respect to that particular false declaration count and only with respect to that particular defendant (Gov. A. 189-192.)

---

* Essentially defendants' position was that introduction of the grand jury testimony as contained in the false declaration counts would constitute a prohibited "use" of that testimony against defendants on the civil rights charges, even if a limiting instruction was given to the jury prohibiting any such use (App. A. 21-88). Defense counsel noted that the same argument applied to the limiting instruction given to the grand jury, and thus the grand jury could only properly vote on a perjury indictment (App. A. 83-88).

** The government and defendants reached a stipulation that the testimony as set forth in the false declaration counts of the indictment was a true and accurate transcription of that portion of defendants' grand jury testimony (Gov. A. 184-188), and that testimony was read to the jury from the indictment (R. 913-938). It was unnecessary, then, to introduce the grand jury transcripts into evidence.

(2)

Appellants make the broad contention that the indictment should be dismissed because of the "taint" attached to it by the government's use of their immunized federal grand jury testimony. More specifically, relying on *United States* v. *Hinton*, 543 F.2d 1002 (2d Cir. 1976), appellants note in this regard that the same federal grand jury which heard their immunized testimony indicted them on the charges contained in the instant indictment (civil rights and false declaration offenses). At the outset, however, it would perhaps be helpful to the Court to focus more closely on the issues which are properly before the Court and the effect, if any, which those issues have on this appeal.

Appellants did not claim below that there was any derivative use of their immunized federal grand jury testimony (use of any information directly or indirectly derived from the testimony), and did not move to suppress any evidence as being tainted by such a derivative use. Having failed to do so, appellants cannot now assert any such claim.* *United States* v. *Bianco*, *supra*, 534 F.2d at 507-508; *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966).

The only contention made below concerning the immunized federal grand jury testimony was that its in-

---

* The sources of the government's evidence against appellants were established in the post-trial evidentiary hearing, which showed that these sources were wholly independent from Anzalone's immunized state grand jury testimony. Although that hearing was not concerned with appellants' immunized federal grand jury testimony, since the sources of the evidence all predated appellants' federal grand jury testimony it is obvious that the evidence was not in any way derived from appellants' federal grand jury testimony.

troduction in evidence on false declaration charges before the same jury (whether a petit or grand jury) which considers the civil rights charges constitutes a prohibited "use" of that testimony. Further, the only remedy appellants sought in this regard was a severance and separate trial of the civil rights and false declaration charges. Whether such an event constitutes a prohibited "use" warranting severance thus is the basic issue before the Court on this appeal.

Moreover, the effect of this issue on this appeal is a limited one. 18 U.S.C. § 6002 expressly allows the use of immunized grand jury testimony against a defendant in a prosecution for perjury or for giving a false statement.* Therefore the issue involved herein has no effect on appellants' convictions on the false declaration counts;** those convictions must stand regardless of the outcome of this issue with respect to the civil rights counts.***

---

* In *Hinton*, relied on so heavily by appellants, the Court specifically noted that the appeal did not involve a prosecution for perjury or giving a false statement (543 F.2d at 1010, n.9). See also *Langella* v. *Commissioner of Corrections*, — F.2d —, slip op. 577, at 584-585, n.8 (2d Cir. Nov. 22, 1976).

** Each appellant was convicted on one false declaration count, and sentenced to a term of imprisonment of one year thereon. In addition, each appellant was convicted on the substantive civil rights offense (a misdemeanor) and sentenced to a term of imprisonment of one year thereon, to run concurrently. Appellant Vivelo was also convicted on the civil rights conspiracy count, and sentenced to a concurrent term of imprisonment of 18 months thereon. Accordingly, the conspiracy count against appellant Vivelo is the only one to which the concurrent sentence doctrine would not be applicable. See *Barnes* v. *United States*, 412 U.S. 837, 848, n.16 (1973).

*** There was a commonality of proof on the civil rights and false declaration counts, as the false testimony involved denials of participation in events alleged as overt acts in the civil rights conspiracy count. Had there been separate trials on the civil rights and false declaration counts, the same evidence would have been introduced in each trial except that in the false declaration trial the grand jury testimony set forth in the false declaration counts would have been introduced as well. Trial counsel for appellant Anzalone conceded as much below (App. A. 59-60).

(3)

With the matter now placed in its proper context, we can turn to the issue raised by the fact that the same jury which heard appellants' immunized federal grand jury testimony in connection with false declaration charges also considered and decided the civil rights charges.

18 U.S.C. § 6002 provides that immunized testimony may not be "used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order". As will be shown below, in our view in the context of this case involving false exculpatory grand jury testimony and an effective limiting instruction, there was no prohibited use of the grand jury testimony;* reversal of appellants' convictions of civil rights offenses is not warranted.

Appellants' grand jury testimony was not introduced in evidence against them on the civil rights counts. The jury was specifically instructed not to use appellants' grand jury testimony in connection with the civil rights offenses. Therefore, unless the limiting instruction is ineffective, the jury has not "used" the immunized grand jury testimony "against" the witness in the criminal prosecution for civil rights offenses.

Where, as here, the immunized grand jury testimony consists of denials of participation in the substantive

---

* Whether or not there is a prohibited use would appear to be a legal issue resolution of which is the same whether the jury was a petit or grand jury. However, the remedy may differ. Accordingly in this subdivision the issue will be discussed in the context of the trial jury and whether reversal of the convictions is warranted. The next subdivision will address the matter of dismissal of the indictment.

events, a limiting instruction such as was given here to both the grand and trial juries does constitute meaningful protection against use of that testimony on counts other than the particular false declaration count to which it related. *United States* v. *Pacente*, 503 F.2d 543, 546-548 (7th Cir.) (*en banc*), *cert. denied*, 419 U.S. 1048 (1974).* See also *United States* v. *Braasch*, 505 F.2d 139, 150 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States* v. *Gill*, 490 F.2d 233, 239 (7th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974).

This is particularly true in the instant case. The jury was aware from appellants' grand jury testimony relating to Counts Four and Five that appellants denied any participation in the shooting of the windows. However, this was surely nothing new to the jury. The jury was aware from appellants' plea of not guilty to Count Two of the indictment (charging that they did participate in the shooting of the windows) that appellants' position was that they did not participate in that act.** Consequently, the situation herein is clearly different from a situation such as posed by *Bruton* v. *United States*, 391 U.S. 123 (1968), where a limiting instruction does not give adequate protection. See *United States* v. *Pacente*, *supra*, 503 F.2d at 548. See also

---

* The *Pacente* case did not involve immunized grand jury testimony. However, it stands as square authority for the proposition that a limiting instruction does provide meaningful protection against use of grand jury testimony relating to a false declaration count against the defendant on a substantive count. In this regard it might be noted that the petit jury herein was not aware that the grand jury testimony was immunized.

** Similarly regarding the grand jury testimony relating to Counts Nine and Ten of the indictment, the jury was already aware of appellants' position concerning their actions on the night of the fire from the trial testimony of Fire Marshal Romero and Detective Corbett relating their interviews of appellants (R. 1104-1116, 1047-1049). At all events we need not concern ourselves with this aspect, as the jury acquitted appellants on Counts Nine and Ten.

United States ex rel. Catanzaro v. *Mancusi*, 404 F.2d 296, 300 (2d Cir. 1968), *cert. denied*, 397 U.S. 942 (1970), and its progeny.*

Therefore, it would appear that upon close analysis of the situation herein (where the jury was effectively prohibited from using the grand jury testimony against appellants on the civil rights counts), the use of the testimony falls within the language of the statute allowing use of the testimony against a witness in a prosecution for perjury or giving a false statement. Such an interpretation is supported by the policy underlying the use immunity statute. As this Court stated in *United States* v. *Tramunti*, 500 F.2d 1334, 1342 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974):

> The theory of immunity statutes is that in return for his surrender of his fifth amendment right to remain silent lest he incriminate himself, the witness is promised that he will not be prosecuted based on the inculpatory evidence he gives in exchange. However, the bargain struck is conditional upon the witness who is under oath telling the truth. If he gives false testimony, it is not compelled at all. In that case, the testimony given not only violates his oath, but is not the incriminatory truth which the Constitution was intended to protect. Thus, the agreement is breached and the testimony falls outside the constitutional privilege.

See, also, *United States* v. *Kahan*, 415 U.S. 239 (1974).

---

* The situation herein would be analogous to that in *Bruton* if appellants' testimony contained incriminating admissions concerning participation in acts forming the basis for the civil rights offenses. However, their testimony did not contain such admissions.

Further, even if it be determined that the limited use made herein is not specifically covered by the exemptions set forth in 18 U.S.C. § 6002, it is of no avail to appellants. As this Court further stated in *Tramunti* (500 F.2d at 1345):

> . . . Thus, there is square authority in the United States Supreme Court holding that the listing of exceptions in immunity statutes for subsequent criminal prosecutions is not intended to be an exclusive enumeration. . . . Moreover, the statute speaks of 'compelled testimony', and the cases establish that this is the incriminatory truth not otherwise available which is at the heart of the immunity intended to be established by the congressional enactments. We therefore cannot attribute to Congress an intent to limit the use of testimony given in violation of the oath solely to the exemptions set forth in the statute.

To hold therefore that the use of the grand jury testimony herein (limited by the court's instruction to the false declaration counts) is in violation of the statute would surely frustrate the purpose which it was designed to achieve.*

---

* In a prosecution for perjury at a criminal trial the Court in *Tramunti* upheld the use against the defendant of false immunized grand jury testimony given by the defendant on a prior occasion, not only to impeach his credibility but also as evidence of prior similar acts. Thus it would appear that the use immunity statute does not prohibit use of appellants' grand jury testimony against them on the civil rights counts, provided the use is limited to appellants' false testimony and not to any truthful and incriminatory testimony. See also *United States* v. *Kahan*, *supra*; *United States* v. *Kurzer*, 534 F.2d 511, 518 (2d Cir. 1976). However, in view of the district court's limiting instruction, it is not necessary to go that far herein.

The reasoning set forth herein was considered to be persuasive by the district court. There is, however, a subsequent decision by a panel of this Court which must now be considered on the issue. In *United States* v. *Hinton*, *supra*, 543 F.2d at 1006-1010, under its supervisory power a panel of this Court held that a practice of using the same grand jury that heard the immunized testimony of a witness to indict him on charges involving criminal participation in the substantive matters under investigation by the grand jury constituted reversible error warranting reversal of the conviction and dismissal of the indictment.

However, the instant case is distinguishable, involving as it does a prosecution for civil rights and false declaration offenses in which a limiting instruction was given to both the grand jury and the trial jury.* The effect of the limiting instruction given herein undercuts the rationale for the panel's ruling in *Hinton*.

The panel in *Hinton* appears to have pointed to three factors as justifying application of its supervisory power.

a. First, the panel noted that at least at first glance (543 F.2d at 1007-1008) "despite any instructions from the judge, it would be well nigh impossible for the grand jurors to put [the immunized wit[illegible]'s] answers out of their minds, cf. *Bruton* v. *United States*, 391 U.S. 123 (1968). . . .' *Goldberg* v. *United States*, 472 F.2d 513, 516 (2d Cir. 1973)." The citation to *Bruton* indicates that the *Goldberg* panel had in mind incriminatory statements. This factor is inapplicable to the case

---

* The indictment in *Hinton* was for narcotics offenses, and did not contain any perjury counts. Nor was any limiting instruction involved in *Hinton*.

at bar—involving as it does denials of participation in the relevant act, the shooting of the windows * (as to which the trial jury was already aware by virtue of the not guilty plea to Count Two). There is, therefore, no reason to believe that the limiting instruction was inadequate. See, *supra*, p. 27, and cases cited.

b. The next factor pointed to by the panel was (543 F.2d at 1009):

> Even if Hinton in her testimony before the grand jury substantially denied any involvement in the conspiracy, that denial does not preclude the possibility of improper use against her of her testimony. A juror can draw an inference of a witness's guilt from either a confirmation of, or a denial of participation in, acts about which he is questioned. For instance, if witness X denies involvement in a situation in which one or several other witnesses have already confirmed X's participation, the jurors could reasonably draw an inference that X had not truthfully testified about the incident. Distrust of his testimony on that one point could reasonably lead the jurors to distrust all or a large part of X's testimony on other matters. If witness X had kept silent, or had been permitted to assert his Fifth Amendment privilege, those negative inferences would have been precluded.

First, it is submitted that the panel in *Hinton* erroneously concluded that the Self-Incrimination Clause or

---

* The panel in *Hinton* appears to have recognized this effect at least to some extent. It noted (543 F.2d at 1008): "Here, however, the issue is complicated by the Government's assertions, assertions emphasized by the trial court, that, in fact, Hinton gave no incriminating testimony before the grand jury and that she did not admit any knowing involvement in the facts and circumstances later charged in the indictment against her."

Section 6002, which was intended to provide immunity co-extensive with the privilege against self-incrimination, would preclude such use of false exculpatory statements. The law is to the contrary. See, *United States* v. *Kahan*, *supra*, 415 U.S. at 239-243; *United States* v. *Tramunti*, *supra*, 500 F.2d at 1342-1346. But cf. *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 350, n. 10 (1963) (dictum). Moreover, even if the false exculpatory statements may not be considered on the substantive counts, such negative inferences were precluded by the instruction given to the jury prohibiting them from considering the grand jury testimony on the civil rights counts. Finally, if the doctrine of harmless error is applicable to the erroneous admission of confessions, see *Milton* v. *Wainwright*, 407 U.S. 371, 372 (1972), and to statements admitted in violation of the standards set out in *Bruton*, see, *United States* v. *Brown*, 411 U.S. 223, 230-232 (1973), it is surely applicable to errors of this kind, if there was error at all.

Here there was not only the cautionary instruction about which we have already spoken, but the "incriminating component of [appellants'] pretrial statements derives not from their content", but at most from their falisity (*United States* v. *Kahan*, *supra*, 415 U.S. at 243). Yet the same evidence which establishes that the statements were false is the same evidence which would establish their guilt of the substantive offense. Put another way, the immunized testimony was of no use to the United States until it was shown to be false; but since the same proof that would establish its falsity would also establish appellants' guilt on the substantive offense, the appellants could hardly claim prejudice on the substantive offense merely because the jury heard the immunized testimony denying their guilt on the substantive charge.

c. The third and final factor relied on by the *Hinton* panel was set forth as follows (543 F.2d at 1010):

> . . . for us to condone the practice of having the same grand jury that heard the immunized testimony indict the witness who so testified is to invite action where the cure is worse than the malady. The prospect of peering into the grand jurors' minds, or of examining them individually, to ascertain whether Hinton's testimony was improperly used, is both impractical and unpalatable. To so defile the secrecy of the grand jury process is to compound the problem the Government has created, rather than to alleviate it.* The alternative of convening a grand jury distinct from that which heard the immunized testimony is not so onerous as to justify the jeopardizing of a defendant's Fifth Amendment rights.** To hold otherwise is to permit intrusion into the long-approved common law secrecy of the grand jury process.

Again, due to the limiting instruction in the case at bar (given to both the grand jury and the petit jury), and the other considerations discussed above, this factor is inapplicable; there is no need to apply a subjective test and

---

* In a real sense it is the witness (potential defendant) who has created the problem. For if the witness told the incriminatory truth, the very purpose underlying the use immunity statute, the grand jury would not have been asked to indict him. There would be no occasion for a joint trial on substantive and perjury charges against the witness.

** The burden on the government, the trial court, and the public as jurors is not a light one. For example, the trial herein lasted approximately one month. If a severance of the civil rights and false declaration counts had been granted, a second trial of similar duration would have been required. Further, given the policy underlying use immunity as set forth in *Tramanti* and the fact that the witness' *false* testimony is not "compelled" within the meaning of the Fifth Amendment, there is no real jeopardy to a defendant's Fifth Amendment rights in the situation in the case at bar.

delve into the minds of the jurors. As in the line of cases distinguishing *Bruton*, an objective test can and should be applied: are the circumstances such that the limiting instruction gives meaningful and effective protection, or are the circumstances such that there is a substantial risk the jury will not reasonably be able to follow the instruction to consider the evidence only in a limited manner. As noted earlier, under the circumstances involved herein the limiting instruction does provide meaningful, effective protection.

Accordingly, there was no prohibited use of appellants' immunized federal grand jury testimony in the case at bar.

Even assuming *arguendo* a prohibited use, at the very least the analysis made herein demonstrates that under the particular circumstances of this case there was no prejudice to appellants warranting reversal of the convictions. The denial of severance, if error at all, was harmless error.

(4)

The final matter to be considered is the validity of the indictment. Under the analysis made above showing that there was no prohibited use of appellants' immunized grand jury testimony obviously the indictment was proper.

Even assuming *arguendo* a prohibited use, under the particular circumstances of this case the indictment should stand; dismissal is not an appropriate remedy.

The general rule was clearly set forth in *United States* v. *Calandra*, 414 U.S. 338, 344-345 (1974):

> [T]he validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to

> challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence, *Costello* v. *United States*, [350 U.S. 359 (1956)], . . . or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination, *Lawn* v. *United States*, 355 U.S. 339 (1958).

Similarly, in *United States* v. *Blue*, 384 U.S. 251 (1966), the Supreme Court rejected the claim that an indictment should be dismissed on the ground that the prosecution may have obtained evidence in violation of the defendant's privilege against self-incrimination. The Court noted that even if tainted evidence had been presented to the grand jury, "our precedents indicate this would not be a basis for abating the prosecution pending a new indictment, let alone barring it altogether" (384 U.S. at 255, n.3). Again in *Gelbard* v. *United States*, 408 U.S. 41, 60 (1972), the Supreme Court observed:

> The 'general rule,' as illustrated in *Blue*, is that a defendant is not entitled to have his indictment dismissed before trial simply because the Government 'acquire[d] incriminating evidence in violation of the [law],' even if the 'tainted evidence was presented to the grand jury'.

In *United States* v. *Hinton*, *supra*, 543 F.2d at 1010, a panel of this Court departed from this line of authority * and under its supervisory power dismissed the in-

---

* In *United States* v. *Piccini*, 412 F.2d 591, 593-594 (2d Cir. 1969), *cert. denied*, 397 U.S. 917 (1970), in which defendant's testimony in bankruptcy proceedings was before the grand jury, the Court held that defendant was not entitled to dismissal of the indictment even if the testimony was privileged by statute against use in any criminal proceeding. A host of other decisions in the Second Circuit have also recognized the *Lawn-Blue-Calandra* doctrine that an indictment which is valid on its face

[Footnote continued on following page]

dictment where the same grand jury that heard the witness' immunized testimony indicted the defendant on substantive offenses. However, this is a particularly inappropriate case for the Court to apply this newly-established remedy.*

---

will not be dismissed because of the nature of the evidence which was presented to the grand jury. See, *United States* v. *Colasurdo*, 453 F.2d 585, 595-596 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972); *United States* v. *James*, 493 F.2d 323, 326 (2d Cir.), *cert. denied*, 419 U.S. 849 (1974); *United States* v. *Weinstein*, 511 F.2d 622, 627 (2d Cir.), *cert. denied*, 422 U.S. 1042 (1975); *United States* v. *Bertolotti*, 529 F.2d 149, 159 (2d Cir. 1975); *In re Millow*, 529 F.2d 770, 774 (2d Cir. 1976).

* In *Goldberg* v. *United States*, 472 F.2d 513 (2d Cir. 1973), relied upon in *Hinton*, Judge Friendly had observed that despite *Lawn* and *Blue*, "we do not take it to be settled that an indictment would not be subject to dismissal if a defendant could establish that it was obtained on the basis of testimony compelled from him after a proper assertion of his privilege. See *Jones* v. *United States*, 118 U.S. App. D.C. 284, 342 F.2d 863, 871-873 (1964) (*en banc*)" (472 F.2d at 516, n.4). Judge Friendly's reference in the text to *Bruton* indicates he was referring to a situation where the defendant made incriminating statements before the grand jury. Further, it is plain that Judge Friendly had in mind an indictment "based" on the compelled testimony of the defendant, i.e., where there was no substantial independent evidence to sustain the indictment. Indeed, in *Jones* v. *United States*, *supra*, cited by Judge Friendly, a majority of the Court of Appeals, relying upon the holding in *United States* v. *Tane*, 329 F.2d 848 (2d Cir. 1964), remanded the case to the district court to determine whether there was independent non-tainted evidence to support the indictments (342 F.2d at 873).

Here, of course, the indictment was in no sense "based" upon the false exculpatory statements made by appellants under a grant of use immunity. Nor was any such claim made below. Indeed, as we have shown the grand jury could not have concluded that the statements were false without concluding on the basis of other evidence that the defendants were guilty of the substantive offense. Moreover, even if it was "based" on the false testimony, it is plain that false testimony does not come within the scope of the "use" immunity. See *United States* v. *Kahan*, *supra*; *United States* v. *Tramunti*, *supra*.

First of all, in contrast with *Hinton* (543 F.2d at 1007) appellants did not make any motion to dismiss the indictment, but were content to rest on their severance motion. See Rule 12(b)(2), Federal Rules of Criminal Procedure; see also *Davis* v. *United States*, 411 U.S. 233 (1973). Secondly, the grand jury herein was given an appropriate limiting instruction concerning use of appellants' grand jury testimony. Third, the procedure undertaken herein was done in good faith prior to the panel's decision in *Hinton*. This is not a case like *United States* v. *Estepa*, 471 F.2d 1132, 1137 (2d Cir. 1972), where a particular undesirable practice had continued despite clear and repeated warnings by this Court, and assurances given by United States Attorneys. The rule established in *Hinton*, if it has any vitality at all in light of the analysis made herein, should not be applied to similar situations occurring prior to the date of the *Hinton* decision. See *United States* v. *Albarado*, 495 F.2d 799, 810 (2d Cir. 1974).

POINT III

The FBI agent's good faith destruction of rough interview notes after preparation of the typewritten statement reflecting the interview does not warrant reversal of the convictions herein.

(1)

On March 5, 1974, FBI agent Savadel conducted an interview of Gerald Maddalone. Maddalone made statements concerning his knowledge of criminal activities in this case. Agent Savadel made numerous rough handwritten notes during the course of the interview. (Gov. A. 308-309, 326-330.)

On that same date, agent Savadel dictated a report from these notes. The statement was then typed up, and

returned to Savadel for proofreading. After proofreading the typewritten statement to make sure that it was as dictated from his notes, agent Savadel destroyed the rough notes pursuant to established FBI practice. Then, on that same day, agent Savadel took the typewritten statement to Maddalone, who read and signed the statement. (Gov. A. 309-314, 318-319.)

A copy of the statement had been turned over to defense counsel as "3500" material (Gov. A. 312-313). However appellants moved to dismiss the indictment based on the destruction of the rough interview notes concerning the interview of Maddalone. The district court denied the motion. (App. A. 321-323.)

(2)

Appellants Anzalone and Vivelo contend that the destruction of the rough interview notes constitutes error warranting reversal of their convictions. In this regard appellants cite decisions by the Ninth and District of Columbia Circuits holding that the FBI must thereafter preserve rough notes taken by FBI agents during interviews of prospective witnesses. *United States* v. *Harris*, 543 F.2d 1247 (9th Cir. 1976); *United States* v. *Harrison*, 524 F.2d 421 (D.C. Cir. 1975). However, in both those cases the Courts of Appeals held that the circumstances did not warrant imposition of any sanctions.

Appellants have not pointed to any factors present in the instant case which would warrant different treatment. The notes were destroyed in good faith after preparation of a typewritten statement and after that statement had been proofread in comparison with the notes. Defense counsel had for use on cross-examination Maddalone's statement (implicating himself and others

in criminal activities) in typewritten form signed by Maddalone, thus making the typewritten statement more useful to defense counsel than the notes.* Further, appellants have not even attempted to make any meaningful showing as to how their defense was in fact prejudiced by this destruction of notes.**

Moreover, this Court has not taken the position that such rough notes must be preserved. While one case in this circuit indicated that the better practice would be to preserve the notes (see *United States* v. *Thomas*, 282 F.2d 191, 194 (2d Cir. 1960)).*** the majority of cases

---

* Thus defense counsel were able to bring out on cross-examination alleged discrepancies between Maddalone's testimony in court and his typewritten statement (see, e.g., R. 475, 495-497, 499, 563, 581-582, 606-607). Defense counsel also had ample other bases on which to attempt to impeach Maddalone, including among others his agreement with the government, his admitted involvement in criminal activities, and his admitted lies to state officials initially investigating the case. Indeed, perhaps in light of effective cross-examination, trial counsel for appellant Anzalone did not view Maddalone as the key witness, but rather viewed Mrs. King (whose testimony corroborated Maddalone concerning the shooting of the windows) as the key witness (App. A. 492).

** Appellant Vivelo also refers in his brief (pp. 16-18) to the presumption arising from the intentional destruction of evidence. Putting aside the fact that there is no evidence herein that the notes were destroyed in bad faith, the jury did hear the testimony of agent Savadel concerning the destruction of the notes (Gov. A. 305). Moreover, appellant does not claim that the district court refused any requested instruction on this matter or prohibited any argument in summation concerning it. Compare *United States* v. *Terrell*, 474 F.2d 872, 877 (2d Cir. 1973).

*** Even in that case this Court declined to impose sanctions (282 F.2d at 194-195). See also *United States* v. *Tomaiolo*, 317 F.2d 324, 327-328 (2d Cir.), *cert. denied*, 375 U.S. 856 (1963) (failure to preserve such notes did not require witness' testimony to be stricken).

in this circuit which discuss the matter have indicated that the practice is not objectionable.* *United States* v. *Terrell*, *supra*, 474 F.2d at 877; *United States* v. *Covello*, 410 F.2d 536, 545 (2d Cir.), *cert. denied*, 396 U.S. 879 (1969); *United States* v. *Comulada*, 340 F.2d 449, 450-451 (2d Cir.), *cert. denied*, 380 U.S. 978 (1965); *United States* v. *Greco*, 298 F.2d 247, 249-250 (2d Cir.), *cert. denied*, 369 U.S. 820 (1962).

Finally, the good faith destruction herein took place on March 5, 1974, long before the above-mentioned decisions of the Ninth and District of Columbia Circuits holding that such notes must be preserved.

Under all these circumstances this is a particularly inappropriate case for consideration of this matter. The good faith destruction surely does not warrant reversal of appellants' convictions.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

January 21, 1977

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

BERNARD J. FRIED,
RONALD E. DEPETRIS,
Assistant United States Attorneys,
(Of Counsel).

---

* Numerous cases discussing this matter are set forth in fn. 25 of *United States* v. *Harrison*, *supra*, 524 F.2d at 430.

★ U. S. Government Printing Office 1976—714-018-AENY-042

Form No. USA-52a-6a
(Rev. 1-29-71)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

RONALD E. DePETRIS, being duly sworn, says that on the 24th day of January, 1977, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~xx~~ TWO COPIES OF THE BRIEF FOR THE APPELLEE--- of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Harvey L. Greenberg, Esq.
16 Court Street
Brooklyn, N.Y. 11241

Stephen Flamhaft, Esq.
32 Court Street
Brooklyn, N.Y. 11201

McGarrahan & Heard, Esqs.
630 Fifth Avenue
New York, New York

Michael P. Direnzo, Esq.
15 Columbus Circle
New York, New York 10023

Sworn to before me this
24th day of January, 1977

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4618258
Qualified in Queens County
Term Expires March 30, 19 77

Ronald E. DePetris

RONALD E. DePETRIS

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19___, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____ duly entered herein on the ____ day of _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

_____ Action No. _____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____
United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____ is hereby admitted.
Dated: _____, 19____

_____
Attorney for _____

FPI-LC-5M-8-73-7355